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No. 95-1576

In The

Supreme Court Of The United States

October Term, 1995

JOAN S. BORAWICK
Petitioner

v.

MORRIE SHAY AND CHRISTINE SHAY
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE AMICUS BRIEF AND BRIEF OF *AMICI CURIAE*, AMERICAN COALITION FOR ABUSE AWARENESS, B.E.A.M., BELIEVE THE CHILDREN, ECLIPSE, INTERNATIONAL SOCIETY FOR PROFESSIONAL HYPNOSIS, JUSTICE FOR CHILDREN, MARILYN VAN DERBUR INSTITUTE, INC., MOTHERS AGAINST SEXUAL ABUSE, NATIONAL GUILD OF HYPNOTISTS, INC., NATIONAL FEDERATION OF HYPNOTISTS 104-OPEIU-AFL/CIO, NATIONAL VICTIM CENTER,* (*IDENTITY OF AMICI CURIAE CONTINUED ON NEXT PAGE) IN SUPPORT OF THE PETITIONER

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35pp

(IDENTITY OF *AMICI CURIAE*, CONTINUED)
ONE VOICE: THE NATIONAL ALLIANCE FOR ABUSE AWARENESS, SURVIVORS AND VICTIMS EMPOWERMENT (SAVE), SURVIVOR CONNECTIONS, INC., SURVIVORS' NETWORK OF THOSE ABUSED BY PRIESTS (SNAP), THE INTERNATIONAL COUNCIL ON CULTISM AND RITUAL TRAUMA, THE LINKUP-SURVIVORS OF CLERGY SEXUAL ABUSE, INC., TREATING ABUSE TODAY,
IN SUPPORT OF PETITIONER

MOTION FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The ruling of the court below profoundly effects the diverse interests of many citizens, including blameless victims of child sexual abuse, adult and child victims of trauma, victims of sexual assault and violent crimes, mental health and other professionals who use hypnosis, and virtually anyone who has previously undergone any of the many forms of therapeutic hypnosis. The impact of the court of appeals ruling is so vast, and the interests so varied, that the eighteen amici are in a position to present the issues from a broader and different perspective than the parties.

The Petitioner's letter consenting to the filing of the attached amicus brief is submitted herewith. The Respondents have withheld consent, necessitating this motion.

I. IDENTITY AND INTERESTS OF AMICI CURIAE

1) American Coalition For Abuse Awareness ("ACAA"), based in Washington, D.C., is a national legislative coalition of over thirty organizations and hundreds of individuals, including adult and child victims of sexual abuse, mental health and legal professionals, non-offending parents and other supporters. ACCA's goal is to promote legislative leadership and to afford access to the legal system for adult and child victims of sexual abuse. ACCA has an interest in more fully presenting the subject matter of childhood sexual abuse from a broader perspective than the parties. ACAA's president is Sherry A. Quirk, Esq.

2) B.E.A.M. - Being Energetic About Multiplicity, based in Kentucky, is an organization whose goals are to educate professionals and laypersons as to the effects of severe childhood trauma, including sexual abuse. B.E.A.M. provides a forum for survivors of abuse to break their secrecy and offers support for comforting victims of abuse. The editor and publisher of its newsletter is Beth Hafling.

3) Believe The Children ("BTC"), is an national non-profit organization based in Cary, Illinois. BTC has provided educational information to the public and professionals on the subject of abuse of children since 1986. BTC conducts annual conferences, publishes a quarterly newsletter, maintains a resource library and disseminates a ritual abuse conviction list.

BTC has an interest in more fully presenting the subject matters of child sexual abuse and ritual abuse. Its executive director is Beth Vargo.

4) ECLIPSE (Emancipating Children from Legal Injustice, Pornography & Sexual Exploitation), based in South Carolina, is a national nonprofit corporation which provides legal, investigative and other professional assistance in severe cases of child abuse and trauma. ECLIPSE has an interest in more fully presenting the subject of severe child abuse and trauma. Its executive director is Sylvia Lynn Gillotte, Esq.

5) International Society For Professional Hypnosis ("ISPH"), based in Connecticut, is an international nonprofit organization formed to provide education and credentialling to professional hypnotists and hypnotherapists worldwide. ISPH has an interest in requesting review of the court of appeal's decision because of its dramatic impact upon professional hypnotists and hypnotherapists. Its executive director is Robert J. McGrath, M.A., a professional hypnotherapist.

6) Justice For Children ("JFC") is a national child advocacy organization headquartered in Texas, with chapters in California, Florida, Indiana, Michigan, South Carolina, Texas and Utah. Formed in 1987, JFC advocates the interests of abused and neglected children whose cases have been lost in the child welfare, family court, and/or criminal justice systems. JFC has an interest in more fully presenting the impact of the court of appeals decision upon child victims of abuse. JFC's president is Randy Burton.

7) Marilyn Van Derbur Institute, Inc. ("MVDI"), based in Colorado, was founded by Marilyn Van Derbur. Ms. Van Derbur, a co-founder of One Voice, repressed her memories as an incest survivor until age 24 and has spoken publicly in an effort to stop the sexual violation of children. MVDI has an interest in more fully presenting the interests of incest survivors.

8) Mothers Against Sexual Abuse ("MASA"), based in California, is a national non-profit organization founded for purposes of educating society on the occurrence and debilitating effects of child sexual abuse, supporting legislation to protect children, and providing resources for victims and families. MASA has an interest in the petition. MASA's president and founder is Claire R. Reeves.

9) National Guild of Hypnotists, Inc., ("NGH"), based in New Hampshire, is a nonprofit organization founded in 1951 with local chapters in all fifty states. NGH, having a membership of over 4,000 hypnotherapists and hypnotists, provides certification and re-certification programs, educational materials, hosts seminars, workshops, annual conventions and educational conferences to promote the professional, responsible and ethical use of hypnosis. NGH has an interest in the petition so that the interests of hypnotists and hypnotherapists can be more fully presented. NGH's executive director is Dwight Damon, D.C.

10) National Federation of Hypnotists Local 104 Office and Professional Employees International Union AFL-CIO ("NFH"), based in Merimack, New Hampshire, is a union for professional hypnotherapists. NFH has members in 33 states active in providing educational and legal assistance to its membership. Representing the interests of professional hypnotists and hypnotherapists, NFH has an interest in the petition.

11) National Victim Center ("NVC"), a nonprofit organization based in greater Washington, D.C., is a leading advocate for victims of violence. NVC promotes the responsiveness of the criminal and civil justice systems to the rights and needs of crime victims, and works to increase public awareness concerning their plight. NVC has been the pioneer in advocating the restorative justice for crime victims through the civil justice process. In conjunction with the Crime Victims Research and Treatment Center, NVC prepared the frequently cited study, *Rape In America: A Report to the Nation* (April 23, 1992). NVC has an interest in the petition by representing the interests of the many victims of incest, rape and other violence.

12) One Voice: The National Alliance For Abuse Awareness ("One Voice"), based in Washington, D.C., is a national non-profit organization formed to improve the quality of life for children and adult survivors of incest, sexual abuse, and physical and emotional abuse, through public education, advancements in law, justice and public policy. One Voice has an interest in assuring that the issues relating to child abuse, incest and sexual abuse can be more fully presented. One Voice's president is Sherry Quirk, Esq.

13) Survivors and Victims Empowered ("SAVE"), based in Pennsylvania, is a nonprofit organization formed to assist adult

survivors of childhood trauma, and to prevent the criminal neglect and physical, emotional and sexual abuse of children. SAVE has an interest in more fully presenting the impact of the court of appeals decision upon victims of child abuse. Its executive director is L. Philip Sheldon, Jr.

14) Survivor Connections, Inc. ("SC") is a national nonprofit organization based in Rhode Island, co-founded by Frank and Sara Fitzpatrick. In 1989, at the age of 41, Mr. Fitzpatrick began to regain memories of having been sexually abused by former priest, James Porter in the 1960s. Convicted on 41 counts, James Porter is believed to have sexually abused over 100 individuals. SC provides informational and educational support to survivors of sexual abuse and professionals. Representing the interests of child and adult survivors of clergy and non-clergy sexual abuse, both male and female, SC has an interest in the petition. SC's president is Frank Fitzpatrick.

15) Survivors' Network of those Abused by Priests ("SNAP"), based in Illinois, is an organization whose goal is to assist survivors of clergy sexual abuse. SNAP support groups have formed or are in the process of forming in Illinois, Missouri, Pennsylvania, California, Kansas, Maine, Colorado, New York, Florida, New Mexico and Wisconsin. SNAP has an interest in more fully presenting the concerns of victims of clergy sexual abuse. SNAP's national director is David Clonessy.

16) The International Council on Cultism and Ritual Trauma ("ICCRT") is a national non-profit organization based in Dallas, Texas; it provides resources, educational materials, and conducts conferences on the investigation, treatment and prevention of ritual and cult ritual abuse. The ICCRT has an interest in the petition by more fully representing the interests of victims of incest, sexual abuse, ritual abuse and cult ritual abuse. The ICCRT's executive director is Pamela Perskin.

17) The LINKUP, Survivors of Clergy Sexual Abuse, Inc. ("LINKUP"), based in Illinois with over 5,000 members, assists victims of clergy sexual abuse to overcome its traumatic effects and promotes responsible institutional policies to prevent clergy abuse. LINKUP has an interest in representing victims of clergy abuse who may be effected by the court of appeals decision. Its president is Thomas H. Economus.

18) Treating Abuse Today ("TAT"), based in Seattle,

Washington, is an entity which publishes a bimonthly publication for clinicians and other professionals who work with people who have suffered trauma, including survivors of physical, emotional, and sexual abuse. TAT has an interest in ensuring that the interests of survivors of trauma are more fully presented. The editor and publisher of *Treating Abuse Today* is David Calof.

II. ARGUMENT ON THE MOTION

The prevalence of child sexual abuse is alarming and the emotional scars it leaves enduring. It is estimated that between one fifth to one third of all women have experienced some form of sexual abuse in childhood. Williams, *Recall of Childhood Trauma: A Prospective Study of Women's Memories of Child Sexual Abuse*, 62 Journal of Consulting and Clinical Psychology 1167 (1994).

The issues raised by the petition effect the rights and interests of many, including numerous victims of incest, rape, violent crimes, ritual abuse, clergy abuse, cult ritual abuse, and trauma victims. These issues also extend to the many professionals who use hypnosis, and to anyone who has undergone hypnosis, whether for alleviation of stress, chronic illness, chronic pain, weight reduction, to enhance athletic performance, to improve self-confidence, to treat phobias, or for the multitude of other beneficial uses of hypnosis. The amici are in a better position and have a greater familiarity with the profound impact of the Court of Appeals ruling upon persons other than the parties. The issues raised by the petition are of consequence to a vast multitude of persons.

THE AMICI CURIAE

BY_____

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QUESTIONS PRESENTED FOR REVIEW

I. Whether Individuals Previously Hypnotized For Therapeutic Purposes Are Competent To Testify In Civil Cases Under Federal Rule of Evidence 601, Being An Issue Of Compelling Public Importance Left Undecided By This Court In *Rock v. Arkansas*, 483 U.S. 44 (1987)?

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INTRODUCTION AND SUMMARY OF THE ARGUMENT

Child sexual abuse and incest leaves enduring and devastating emotional and psychological scars upon its victims. Tragically, it is a social ill often perpetuated from one generation to the next. It is estimated that as many as one in five females and one in seven males are sexually assaulted by age eighteen. The perpetrator is usually someone familiar to the victim. While some victims may not survive the assault, many of the survivors develop dissociative disorders and post-traumatic stress disorder. Symptoms can include fear, helplessness, shock, disbelief, guilt, humiliation, embarrassment, anger, self-blame, flashbacks of the rape, avoidance of previously pleasurable activities, avoidance of the place and circumstance where the assault occurred, depression, sexual dysfunction, insomnia, impaired memory, anxiety, panic attacks, sleep disorders, somatization disorders, eating disorders, chronic pain, gastrointestinal distress, and other lingering medical problems. Reliable prospective and retrospective studies have demonstrated that victims of sexual

abuse can experience dissociative amnesia of the abuse for varying periods of time.

Hypnosis is a mental process and naturally occurring state of mind that all individuals experience. It has been practiced for over two hundred years and has been officially recognized by the American Medical Association and the American Psychological Association for decades. Recently, in 1995, an independent panel of the National Health Institute found hypnosis effective for treating cancer-related pain, irritable bowel syndrome and tension headaches. Undeniably, a large portion of our population has been hypnotized for approved therapeutic reasons. The legal rights of these and others previously hypnotized individuals to testify may be jeopardized if the Court of Appeal's nonexclusive multi-factor "totality of the circumstances" test remains law.

Borawick v Shay offers this Court the opportunity to rectify the decision of the court of appeals. Federal Rule of Evidence 601 mandates that every person is competent to be a witness unless otherwise noted in the succeeding sections of Article Six. Yet, there is nothing so noted or otherwise contained in the Federal Rules of Evidence which supports adoption of the "nonexclusive" multi-factor "totality of the circumstances test" as a precondition to testifying.

The methodology utilized by the court of appeals condones the practice of allowing appellate courts to evaluate credibility by reviewing the underlying claims on contested issues of fact (where there was no trial or evidentiary hearing and thus an inadequate record for any review, even an improper one). This overreaching exercise of judicial discretion encroaches upon the province of Congress, by disregarding Federal Rule of Evidence 601's mandate that every person is competent to be a witness, and also encroaches upon the province of the jury in evaluating credibility. If the court of appeals decision remains law it will condone the practice of barring testimony at the expense of all previously hypnotized civil litigants Fifth Amendment right to due process and Seventh Amendment right to a jury trial. When scientific studies demonstrate that contaminating effects on memory are no more likely to occur from the use of hypnosis

than from many nonhypnotic interviewing and interrogative procedures, the Respondents constitutional rights of due process are adequately protected through cross-examination and offering expert testimony.

The court of appeals decision impacts the right to testify for any civil litigant who has previously been hypnotized. Moreover, a "nonexclusive" factor test gives little future guidance to those professionals who use hypnosis, and will have a chilling effect on the use of a valuable therapeutic modality. The *amici* join in urging this Court to grant the petition for writ of certiorari.

THE ARGUMENT

I. CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER INDIVIDUALS PREVIOUSLY HYPNOTIZED FOR THERAPEUTIC PURPOSES ARE COMPETENT TO TESTIFY IN CIVIL CASES UNDER FEDERAL RULE OF EVIDENCE 601, BEING AN ISSUE OF COMPELLING PUBLIC IMPORTANCE, IMPACTING THE INTERESTS OF MANY, AND LEFT UNDECIDED BY THIS COURT IN *ROCK V. ARKANSAS*

A. THE ISSUE IS OF COMPELLING PUBLIC IMPORTANCE

While the Petitioner consents to the filing of this amicus brief, the Respondents withheld consent necessitating the preceding motion. The amici are representative of the diverse interests effected by the decision of the court of appeals.

The Court of Appeal's decision jeopardizes the right to testify for all individuals who have previously been hypnotized for therapeutic purposes. The decision also impacts the interests of the many professionals who use hypnosis, who now may be inhibited from using this valuable therapeutic tool for fear that they may jeopardize the legal rights of their patients.

The test adopted by the court of appeals for the admissibility of testimony following the therapeutic use of

hypnosis required consideration of the following "nonexclusive" list of factors: 1) an evaluation of the purpose of the hypnosis, whether investigative or therapeutic; 2) whether the subject received any suggestions from the hypnotist or others prior to or during the hypnosis; 3) the presence or absence of a permanent record, which can help the court ascertain whether suggestive procedures were used, [with the court of appeals stating] that ideally the sessions should be videotaped or audiotaped; 4) whether the hypnotist was appropriately qualified by training in psychology or psychiatry; 5) whether corroborating evidence exists to support the reliability of the hypnotically-refreshed memories; 6) evidence of the subject's hypnotizability; 7) and consideration of expert evidence offered by the parties as to the reliability of the procedures used. *Borawick v Shay*, 68 F.3d 597, 607-608 (2nd Cir. 1995).

Hypnosis has been used as a therapeutic treatment modality for over a century, having even more widespread use in the past few decades. Beginning in 1955, the British Medical Association endorsed therapeutic hypnosis, followed by the Canadian Medical Association's and the Council of Mental Health of the American Medical Association's (AMA) endorsements in 1958. In 1960, two years after the AMA's approval, the American Psychological Association (APA) endorsed hypnosis as a branch of psychology. Scheflin & Shapiro, *Trance On Trial*, pp. 57-58 (Guilford Press 1989).

In addition to its use by some psychiatrists and psychologists, therapeutic hypnosis is used by a multitude of other professionals, including hypnotherapists, anesthesiologists, obstetricians, optometrists, podiatrists, chiropractors, osteopaths, dentists, marriage and family counselors, social workers, pediatricians, oncologists, nurses, rehabilitation specialists, pain control specialists, habit control specialists, educators, athletic trainers, the clergy and attorneys[1]. *Id.* p.6.

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[1] In his book entitled *The Legal Aspects of Hypnosis*, Dr. William J. Bryan, Jr. has a chapter titled "Winning Cases Through Hypnosis". Bryan, *Legal Aspects of Hypnosis*, Springfield, Il: Charles C. Thomas, 1962.

As recently as October of 1995, an independent panel of the National Institutes of Health (NIH) determined that meditation and hypnosis are among the alternative treatments recognized to help millions of Americans cope with insomnia, chronic pain, irritable bowel syndrome and tension headaches. For *Chronic Pain Try Hypnotism, Relaxation,* (Associated Press), The News-Times, October 19, 1995 at A-9, col. 1; *Mediation, Hypnosis Relieve Pain, Insomnia, Panel Says National Institutes of Health Urge Greater Acceptance of Therapies*,(Associated Press), Rocky Mountain News, October 19, 1995 at 41A. The panel recommended that treatments be administered by nurse practitioners and social workers to reduce costs. *Id.*

Having been endorsed by the AMA, the APA, and now, an independent panel of the NIH, the use of hypnosis has increased in popularity. Prestigious hospitals such as Mount Sinai Medical Center and Memorial Sloan-Kettering Cancer Center in New York have found hypnosis a valuable tool for treating pain. *Hypnosis Gains Credence As Influence on the Body; It Helps Control Pain, Fear and Habits*, The New York Times, February 24, 1996 at Section 1, page 23, col 2. Even paramedics are using hypnotic techniques to calm trauma victims. Several members of the North Tarrytown, New York Volunteer Fire Department Ambulance Corps studied hypnosis techniques during a workshop to improve their communication skills with accident victims. *Id.*

Although identical in effect, a definitional distinction should be drawn between hetero-hypnosis, self-hypnosis and spontaneous hypnosis. Hetero-hypnosis involves both a hypnotist and subject whereby the hypnotist facilitates the mental process of hypnosis using one of many methods of induction. While no data are available as to the number of individuals who have undergone therapeutic hetero-hypnosis, they are undoubtedly many in number. There are over 4,000 members of the National Guild of Hypnotists, Inc. alone, who have undoubtedly hypnotized tens of thousands of individuals over the course of the guild's existence since 1951.

Apart from the widespread use of hetero-hypnosis, self-hypnosis, otherwise known as auto-hypnosis, can occur through

the use of widely available aids such as hypnotic tapes, or spontaneously.

Self-hypnosis is a mental state virtually experienced by all individuals, whether absorbed by reading a good book, experiencing "highway hypnosis" while driving, during athletic exertion, or as part of a religious experience. When self-hypnosis is a mental state which can occur spontaneously in a broad segment of the population, with or without the aid of hypnotic tapes, it is difficult to fathom how many millions of Americans have been hypnotized. All hypnosis is really self-hypnosis and we all engage in self-hypnosis:

> There are many myths about hypnosis. One of the most common myths is that someone takes control of your mind and programs you like a computer. This is not true. No one can be hypnotized if they don't wish to be, and you cannot be made to do anything in hypnosis that would be contrary to your values. No one can violate your free agency. Similarly, no one can make you reveal anything in hypnosis that you don't wish to reveal... In actuality, hypnosis is not something someone does to you. All hypnosis is really self-hypnosis. You are the one who induces a hypnotic state, and the person working with you is simply a facilitator who guides you in what to do. There is nothing mystical or magical about hypnosis. Hypnosis is simply a state of concentration and focused attention. It is actually a state of consciousness that we enter naturally, but we usually don't call it hypnosis or trance. For example, how many times have you driven down the road, deep in thought, preoccupied in thinking about something? You suddenly snap out of it and realize that you haven't seen anything for several blocks. Almost everyone has had this experience. These focused, concentrated states of attention are naturally occurring hypnotic or trance-like states. *D. Corydon Hammond, Ph.D. in his Manual For Self-Hypnosis* (American Society of Clinical Hypnosis 1987), pp. 2-3.

Coinciding with the increasingly frequent use of therapeutic hetero-hypnosis and the common occurrence of self-hypnosis, is the astoundingly high incidence of child abuse in this country. The Department of Health and Human Services reports that 1,012,000 children in 48 states were victims of substantiated child abuse and neglect in 1994, an increase of 27 percent since 1990. *Child Maltreatment 1994: Reports from the States to the National Center on Child Abuse and Neglect* (March 1996). The HHS report found that 53 percent of maltreated children suffered neglect, 26 percent physical abuse, 14 percent sexual abuse, 5 percent emotional abuse and 22 percent other forms of maltreatment. *Id.* This study suggests that there were at least 141,680 cases of sexual abuse in 1994.

Data has also been collected on reports of child rape. In a study conducted by the U.S. Department of Justice analyzing reports of rape in 11 states and the District of Columbia, the Bureau of Justice Statistics determined that over half the victims were under 18, even though females under 18 comprise only one-fourth the female population, sixteen percent of the victims were under 12, and 35 percent were between ages 12 and 18. *Child Rape Victims*, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics (June 1994, NCJ-147001).

A recent survey of convicted offenders in state correctional facilities conducted by the U.S. Department of Justice also confirms that victims of rape and sexual assault are often children. This study determined that nearly two-thirds of rapists and sexual assaulters in state prison committed their crime against a child. *Child Victimizers: Violent Offenders and Their Victims*, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics (March 1996, NCJ-153258). Seventy-eight percent of those convicted of sexual assault had abused a child. The victims of violent crimes were typically children whom they had known, not randomly selected strangers. Nearly a third of those serving time in State prisons had victimized their own child or a stepchild. *Id.* at p. iv. About one-half had a relationship with the victim as a friend, acquaintance, or relative other than offspring. *Id.* Among inmates who committed their violent crime against a child, 3 in 10 reported having victimized more than one child. *Id.* at p.9. Offenders serving time for crimes against children were more likely to have grown up in

homes with both parents present, to have suffered sexual abuse as a child, and to have committed their offenses in their own home. *Id.* at p.6. Like other behavior, abuse is often perpetuated from one generation to another, with some abused later becoming abusers.

The American Medical Association reports that sexual assault is the most rapidly growing violent crime in America, claiming a victim every 45 seconds. News Release: AMA Reports *"Silent Violent Epidemic" of Sexual Assault Throughout The United States* (AMA, Nov. 6, 1995). The National Victim Center reports that over 700,000 women are raped or sexually assaulted annually. Crossing gender lines, the crime is often committed upon our nation's children; an estimated 61% of victims of sexual assault are under age 18. An astounding 29% of all forcible rapes are perpetrated upon victims less than 11 years old. As many as 80% of the assaults are perpetrated by assailants known to the victim, such as family members, intimates, friends, and acquaintances. *Sexual Assault in America Prepared by the American Medical Association* (AMA, November 6, 1995).

Many victims of sexual assault develop post-traumatic stress disorder and rape trauma syndrome. Symptoms include fear, helplessness, shock and disbelief, guilt, humiliation and embarrassment, anger, self-blame, flashbacks of the rape, avoidance of pleasurable activities, avoidance of the place or circumstance in which the rape occurred, depression, sexual dysfunction, insomnia, and impaired memory. *Facts About The Mental Health Effects of Violence,* American Medical Association Backgrounder (November 1995). It is estimated that as many as 3.8 million adult American women have had rape-related post-traumatic stress disorder. *Rape in America: A Report To The Nation* (prepared by the National Victim Center and Crime Victims Research and Treatment Center, April 23, 1992). Symptoms may also include depression, anxiety, panic attacks, sleep disorders, substance abuse, aggression, dissociative states, somatization disorders, eating disorders, chronic pain, suicidal tendencies, chronic head, face or pelvic pain, gastrointestinal distress, insomnia, pseudo-neurological symptoms and other medical complaints common to adult survivors of child physical and sexual abuse. *Id.*

Common diagnoses for victims of adult and child victims of rape are Posttraumatic Stress Disorder, Dissociative Disorders such as Dissociative Amnesia (formerly Psychogenic Amnesia), and Dissociative Identity Disorder (formerly Multiple Personality Disorder). Kanovitz, *Hypnotic Memories and Civil Sexual Abuse Trials*, 45 Vand. L. Rev. 1185 (1994); also see, the American Psychiatric Association's *Diagnostic And Statistical Manual of Mental Disorders*, DSM-IV (4th ed. 1994) diagnostic codes 309.81 for Posttraumatic Stress Disorder, 300.12 for Dissociative Amnesia, and 300.14 for Dissociative Identity Disorder. The Diagnostic And Statistical Manual is the source generally relied upon by psychiatrists, psychologists and other mental health professionals in making a diagnosis. *Beagel v State*, 813 P.2d 699, 708 (Alaska App. 1991).

Several types of memory disturbances have been described in Dissociative Amnesia: localized amnesia, the inability to recall events during a circumscribed period of time usually following a traumatic event; selective amnesia, the ability to recall some, but not all of the events during a circumscribed period of time; generalized amnesia, a failure to recall one's entire life; continuous amnesia, an inability to recall events subsequent to a specific time; and systematized, the loss of memory for certain categories of information. *Diagnostic And Statistical Manual of Mental Disorders*, DSM-IV, p. 478 (4th ed. 1994).

Hypnotic states overlap with dissociative disorders. Indeed, for this reason, some experts recommend hypnosis in the treatment of dissociative disorder therapies for victims of sexual abuse. Spiegel, *Hypnosis In The Treatment of Victims of Sexual Abuse*, 12 Psychiatric Clinics of North America, No. 2, p. 307 (1989). Many individuals who suffer from dissociative disorders also have a heightened capacity to lapse into spontaneous trance states. Kanovitz, *Hypnotic Memories and Civil Sexual Abuse Trials*, 45 Vand. L. Rev. 1185, 1208 n. 89 (1992). The American Psychiatric Association's DSM-IV also *recommends the use of hypnosis* to distinguish Dissociative Amnesia from Amnestic Disorder Due to a General Medical Condition. DSM-IV, p. 408. It would be ironic indeed if victims of child sexual abuse would be barred from testifying because of the very dissociative capacities brought about by the

abuse.

Legislative, judicial and societal developments in the past seven years will cause this evidentiary issue to arise repeatedly. Since 1989, nineteen states have enacted laws preserving the tort claims for adults who were sexually abused as children and who experienced dissociative amnesia for the abuse. Comment, *Recovered Memories of Childhood Sexual Abuse: The Admissibility Question*, 68 Temple L. Rev. 249, 257 (1995). By legislative enactment, twenty-three jurisdictions toll the statute of limitations for plaintiffs who have repressed memories of childhood sexual abuse. *Id.* at 257. Seven jurisdictions have judicially recognized the delayed discovery rule for purposes of tolling the statute of limitations in instances where plaintiffs completely repress their memories of abuse. *Id.* at 255. Opening the door for civil redress, it seems illogical that victims of sexual assault will now be disabled from testifying in their own civil cases if they were, at some point, hypnotized.

A number of empirical studies verify the existence of lost access to memory and the possibility of accurate memory recovery in sexual abuse cases. A prospective study of 129 women who had documented histories of child sexual abuse found a full 38% of the women did not report the abuse that was recorded in earlier hospital documents when they were asked about the experiences seventeen years later. An additional 16% who did recall the abuse, did not have continuous recall for the sexual abuse. Bowman & Mertz, *A Dangerous Direction: Legal Intervention In Sexual Abuse Survivor Therapy*, 109 Harvard Law Review 549, 604-608 (1996) citing Williams, *Recall of Childhood Trauma: A Prospective Study of Women's Memories of Child Sexual Abuse*, 62 Journal of Consulting and Clinical Psychology 1167 (1994). The phenomenon of dissociative amnesia for childhood sexual abuse has been documented in numerous prospective, retrospective and survey studies. Williams 1994, Herman & Schatzow, 1987, Briere and Conte, 1993, Elliot and Briere, 1995, and other studies.

The Briere and Conte study of 450 adults with reported histories of childhood sexual abuse found that 59.3% of the subjects reported a period of amnesia for the abuse. The variables most predictive of amnesia were "molestation at an early age, extended

abuse, and variables reflecting especially violent abuse". The last category included victimization by multiple perpetrators, physical injury accompanying the abuse, and belief that death would result if the abuse were disclosed. *Id.* at 606.

Proven cases also establish the existence of substantially accurate delayed recall for childhood sexual abuse. The cases of Frank Fitzpatrick and Ross Cheit are illustrations. 109 *Harv. L. Rev.* at 610, n. 335. In 1989 at the age of 41, Frank Fitzpatrick recovered his initial memories of sexual abuse by former priest James Porter who sexually abused over 100 children since the 1960s. The abuse was confirmed by Porter's admission in a recorded phone conversation and on video, and by numerous other individuals who came forward, some of whom had continuous memory of the abuse. *Id.* Ross Cheit, an ethics professor at Brown University, recovered fully blocked memories of sexual abuse that had occurred almost 25 years earlier at the San Francisco Boys Chorus summer camp. Cheit was able to obtain confirmation from other victims and individuals who witnessed incidents of molestation by the same perpetrator. *Id.*

Many victims of child sexual abuse, who have otherwise valid claims, may have been at some point in their lives hypnotized for approved medical reasons. The court of appeal's test will be an evidentiary barrier for many of these individuals.

This case presents itself as a timely opportunity to settle the law and prevent needless litigation concerning this evidentiary issue. The petitioner was hypnotized under the direction of her medical doctor for the supplemental treatment of chronic illness and stress, approved medical purposes. Those who have also been hypnotized for approved medical purposes, who engage in self-hypnosis, who have dissociative disorders and lapse into spontaneous trance, are all at risk of losing their right to testify in their own civil cases because of an inability to comply with the Court of Appeal's nonexclusive multi-factored test. A "nonexclusive" test also gives no definitive guidance to professionals who use hypnosis and hypnotic techniques.

It would be a perversion of justice if individuals raped by a

psychiatrist, psychologist or mental health care worker[2] were now disabled from testifying in their own cases because of an inability to meet the court of appeal's test. Psychotherapeutic sexual involvement with patients is a leading cause of all private psychotherapist malpractice claims, and is the most frequent source of litigation against psychologists insured through the American Psychological Association. *Therapist-Patient Sexual Exploitation And Insurance Liability*, 27 Tort & Ins. L.J. 596-597 (1992). In instances where the victim may have been hypnotized during or after the assault, adherence to a multi-factored evidentiary test as a precondition to testifying is tantamount to granting a license to rape. The perpetrator could easily sabotage compliance with the test as a means of barring the victim's testimony making the perpetrator "conviction-proof". Scheflin, *Forensic Hypnosis: Unanswered Questions*, 22 Australian Journal of Clinical and Experimental Hypnosis No. 1, p. 26 (1994).

Restrictive tests of competency can cultivate the misuse of hypnosis in other ways. This is even more apparent in instances of the most severest form of child sexual abuse, sadistic and ritual child sexual abuse. The forced ingestion of narcotics, drugs, or hallucinogens used to induce a hypnotic trance has been known to be a facet of sadistic abuse, ritual abuse and cult ritual abuse. See for example, Idaho Code § 18-1506A (1994); Illinois Revised Statutes, §5/12-33; Louisiana Revised Statutes Ann. §14:107.1 (1995); and Montana Code Ann. §45-5-627 (1994). It would indeed be a perversion of justice if those victims who suffer the severest form of child sexual abuse are prevented from testifying because of the perpetrators failure to comply with the multi-factored test adopted by the court of appeals.

The interests at stake are of compelling public importance and effect numerous individuals other than the parties.

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[2] Despite ethical and criminal proscriptions, sexual contact between therapists and patients occurs. Several self-reporting surveys report that "[a]s high as 13.7 percent of male [therapists responding] and 3.1 percent of female respondents have reported engaging in some form of erotic contact with at least one patient". Jorgenson, et al, *Therapist-Patient Sexual Exploitation And Insurance Liability*, 27 Tort & Ins. L. J. 595 (1992).

B. CERTIORARI SHOULD BE GRANTED TO DECIDE AN ISSUE LEFT UNDECIDED BY THIS COURT IN *ROCK V ARKANSAS*

In *Rock v Arkansas*, 483 U.S. 44 (1987), a majority of this Court found unconstitutional the state of Arkansas' per se rule of exclusion of post-hypnotic testimony of criminal defendants, recognizing the criminal defendant's constitutional right to testify on his or her own behalf as guaranteed by the Fifth Amendment privilege against self-incrimination, the Sixth Amendment rights to compulsory process and to conduct one's own defense, and the Fourteenth Amendment right to due process. *Id.* 46-47. *Rock* expressly limited its holding to cases involving the investigative or forensic use of hypnosis on criminal defendants, as opposed to its therapeutic use on civil litigants or witnesses in civil cases. *Id.* at 50, n.15. *Rock* did not address the competency of a civil litigant to testify chronologically following the therapeutic use of hypnosis for approved medical purposes.

Paradoxically, if the decision of the court of appeals in this case is left to stand, a previously hypnotized perpetrator hypnotized for the events being litigated could be permitted to testify under *Rock*, while a previously hypnotized victim's testimony could be barred when hypnotized for recognized therapeutic reasons. In contrast to the exclusionary result reached by the court of appeals, "a majority of federal courts and many state courts hold such testimony totally admissible and allow the jury to determine its credibility and weight". Comment, *Recovered Memories of Childhood Sexual Abuse: The Admissibility Question*, 68 Temple L. Rev. 249, 258 (1995). This was the approach followed by the Ninth Circuit even in such forensic precedents as *Wyller v Fairchild Hill Corp.*, 503 F.2d 506 (9th Cir. 1974), *Kline v Ford Motor Co.*, 523 F.2d 1067 (9th Cir. 1975), and *United State v Awkard*, 597 F.2d 667 (9th Cir. 1979), cert. denied, 444 U.S. 885 (1979).

Moreover, the court of appeals requirement that the hypnotist be "appropriately qualified by training in psychiatry or psychology" is not only ill-defined, but could preclude dentists, pain specialists, physical therapists, rehabilitation specialists, habit control specialists, hypnotherapists, social workers, optometrists, chiropractors, the

clergy, medical doctors lacking the judicially defined "appropriate training in psychiatry or psychology", and other professionals from using hypnosis as a therapeutic tool. Indeed, under the court of appeal's test, those professionals may already have jeopardized the legal rights of their patients regardless of the extent of the hypnotic skills. Worse yet, those individuals who have already been hypnotized for approved therapeutic purposes by professionals other than psychiatrists and psychologists, may now be in jeopardy of losing their legal right to testifying.

The nonexclusive multi-factored "totality of the circumstances" test is flawed in other respects. The need for a permanent record assumes that the sworn testimony of the hypnotist is insufficient. This factor automatically assumes an untruthful hypnotist. Those individuals who have been hypnotized for therapeutic purposes in the past, may now have lost their right to testify because no permanent record exists or can be found.

The requirement of corroboration may operate as an evidentiary bar to victims of crimes lacking eyewitnesses, common in instances of rape, sexual assault, child sexual abuse, and for many other crimes. Although offered by the petitioner, lack of corroboration should not bar the testimony, nor should it prove the non-occurrence of the abuse. "Otherwise, victims would have no remedy in cases where the abuse is non-violent or occurs in a private setting, making corroboration more difficult to obtain". Comment, *Recovered Memories of Childhood Sexual Abuse: The Admissibility Question*, 68 Temple L. Rev. 249, 278 (1995).

The hypnotizablity factor may result in an arbitrary evidentiary bar for many civil litigants. There are a number of scientific scales and tests developed for measuring hypnotizability, among them the Harvard Group Scale and the Stanford Hypnotic Suggestibility Scale. See, Kanovitz, *Hypnotic Memories and Civil Sexual Abuse Trials*, 45 Vand. L. Rev. 1185, 1238, n.227 (1994). Hypnotizability is a measure of the individual trait of susceptibility to hypnosis. It is no more appropriate to bar the testimony of an individual's testimony based upon the trait of hypnotizability, than it is to bar testimony on the basis of skin color, gender or ethnicity. This factor requires a litigant to act as a polygraph, rather than

leaving the question of credibility to the jury. Consideration of hypnotizability as a precondition to testifying condones the discriminatory and arbitrary exclusion of relevant evidence.

Lastly, the methodology used by the court of appeals allowed it to evaluate the content of the petitioner's claims unrelated to the hypnosis and to the Respondents and to judge credibility. *Borawick*, at 609. The court of appeals stated: "[t]hat Borawick has made these far-fetched, uncorroborated accusations against others, in addition to the defendants, erodes our confidence in the allegations against Morrie and Christine Shay and properly *weighs* against the admissibility of her [court determined] hypnotically-induced memories". *Id.* Aside from the fact that the petitioner was never required by the district court to prove these unrelated claims as a precondition to testifying, the court of appeals decision was made without consideration of the Federal Rape Shield Statute, Fed. R. Evid. 412. The rape shield statute is designed to protect *victims* and *alleged victims* of sexual assault from any negative inference cast by being a victim of multiple assaults.

The court of appeals equated a competency determination with a credibility determination in a complex psychological damage case without having the expertise to do so and contrary to Fed. R. Evid. 601's specific command that "every person is competent to be a witness". If the decision of the court of appeals is allowed to stand, it will condone the practice of permitting appellate court judges to make credibility assessments on contested issues of fact, usurping the role of the jury at the expense of civil litigants constitutional rights to due process and a jury trial.

The court of appeals mischaracterized its own "totality" test. The only way a "totality of the circumstances test" can fairly be applied is at or near the time of trial, when discovery is complete and the totality of the circumstances are before the court. It is inconceivable that the court of appeals reviewed the totality of the circumstances when it failed to remand the case to the district court for further discovery or even application of its own test. The district court denied the petitioner's timely motion to extend the time for taking depositions and did not rule upon the petitioner's motion to reopen discovery at a critical stage in the case; before the motion in

limine was acted upon. *Borawick*, at 599-600. The petitioner also moved to reopen discovery a second time. In *Anderson v Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986), this court recognized that summary judgment be refused where the nonmoving party has not had the opportunity to discover information that is essential to its opposition. The Second Circuit recently reaffirmed this principle in *Sutera v Schering Corp.*, 73 F.3d 13 (2d Cir. 1995). Litigants, like the petitioner, should not be forced to oppose an exclusionary motion in limine the granting of which was the functional equivalent of entering summary judgment or forced to meet evidentiary tests without being able to fully conduct discovery.

II. CONCLUSION

Therapeutic hypnosis has been endorsed by the American Medical Association, American Psychiatric Association, American Psychological Association, and more recently an independent panel of the National Institutes of Health has recognized its benefits. The widespread use of hypnosis overlays with the harsh reality of the prevalence of childhood sexual abuse and sexual assault in our nation and the lasting psychological injury they cause.

The court of appeals decision profoundly effects the legal rights of any civil litigant who has previously been hypnotized. To adopt an evidentiary barrier for testimony chronologically following hypnosis, ignores Federal Rule of Evidence 601's mandate that all witnesses are competent to testify except as otherwise noted in the succeeding rules of Article Six. The test adopted by the court of appeals is flawed in several respects. The Amici join in respectfully requesting this Court to review the Court of Appeal's decision.

Respectfully submitted,
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